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February 22, 1999

Magalie Roman Salas, Secretary  
Federal Communications Commission  
TW-A325  
445 12th Street, S.W.  
Washington, DC 20554

RECEIVED

FEB 22 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re:    *Comments of NEXTLINK Communications, Inc. and Electric Lightwave, Inc in CC Docket No 99-1, Petition of U S WEST Communications, Inc, for Forbearance from Regulation as a Dominant Carrier for High Capacity Services in the Seattle, Washington Metropolitan Statistical Area.***

Dear Ms. Salas:

Due to a computer production error, NEXTLINK Communications, Inc.'s and Electric Lightwave, Inc.'s comments regarding the Petition of U S WEST Communications, Inc, for Forbearance from Regulation as a Dominant Carrier for High Capacity Services in the Seattle, Washington Metropolitan Statistical Area (CC Docket No. 99-1) were filed under the wrong docket number. Please accept the attached corrected version for late filing.

Very truly yours,

Davis Wright Tremaine LLP



Robert S. Tanner

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**RECEIVED**

FEB 22 1999

In the Matter of )  
Petition of U S WEST Communications, Inc )  
For Forbearance from Regulation )  
As a Dominant Carrier for High Capacity )  
Services in the Seattle, Washington )  
Metropolitan Statistical Area )  
\_\_\_\_\_ )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
CC Docket No. 99-1

**COMMENTS OF  
NEXTLINK COMMUNICATIONS, INC. AND ELECTRIC LIGHTWAVE, INC.**

NEXTLINK Communications, Inc. ("NEXTLINK"), and Electric Lightwave, Inc. ("ELI"), respectfully submit their Comments in opposition to the above-captioned Petition.<sup>1</sup> NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-two (22) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-six (36) markets in fourteen (14) states. ELI is certified to provide a full range of facilities-based and resold local exchange, intraexchange and interexchange private line services, and interexchange long distance services throughout the state of Washington.<sup>2</sup> NEXTLINK and ELI are direct competitors with U S WEST in Washington state and therefore, have a substantial interest in the outcome of this proceeding.<sup>3</sup>

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<sup>1</sup> See Petition of the U S WEST Companies for Forbearance, filed December 7, 1998 ("Petition").

<sup>2</sup> In addition, ELI provides interstate telecommunications services in all fifty states, and is certified as a competitive local exchange carrier in Arizona, California, Minnesota, Nevada, Oregon, Utah and Idaho.

<sup>3</sup> NEXTLINK currently provides local exchange, access and interexchange services in Spokane, Washington through its subsidiary, NEXTLINK Washington, Inc. NEXTLINK plans to provide service in Seattle, Washington by the end of the second quarter of 1999.

## **I. Introduction**

NEXTLINK and ELI oppose U S WEST's attempt to obtain premature pricing flexibility outside of the Commission's comprehensive rulemaking on access charge reform.<sup>4</sup> U S WEST has now filed two petitions for forbearance in two separate "markets" within the space of five months.<sup>5</sup> Unfortunately, U S WEST is not alone, as its fellow Bell Operating Companies ("BOCs") have also filed multiple similar petitions for forbearance.<sup>6</sup> The BOCs appear to be employing a strategy designed to overwhelm the Commission with numerous duplicative proceedings for pricing flexibility. NEXTLINK and ELI urge the Commission instead to dismiss all of the BOCs' unfounded petitions for pricing flexibility and address this issue in its proper forum, the ongoing Access Charge Reform docket.

In its petition, U S WEST not only presents evidence that does not support U S WEST's overreaching assertions, but offers flawed and misleading assertions, and presents a much more favorable view of the competitive situation than actually exists. U S WEST simply cannot demonstrate in any reasonable fashion that it does not continue to possess overwhelming market power in the Seattle market. In addition, U S WEST's pleading is silent concerning U S WEST's failure, whether through its own inability or a lack of effort, to provide competitors with nondiscriminatory access to U S WEST's local network infrastructure as required by the

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<sup>4</sup> Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

<sup>5</sup> See Petition of U S WEST Communications, Inc. For Forbearance, filed August 24, 1998 ("U S WEST Phoenix Petition").

<sup>6</sup> See e.g., Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("SBC Omnibus Petition"); ; Petition of Bell Atlantic For Forbearance, filed January 20, 1999 ("Bell Atlantic Petition"); and Petition of Ameritech For Forbearance From Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, filed February 5, 1999 ("Ameritech Petition"). Moreover these petitions and U S WEST's instant petition are remarkably similar in substantive arguments and the scope of evidence presented. In fact, all of the above petitioners submitted studies prepared by the same company, Quality Studies, Inc., that purport to demonstrate that the petitioners are non-dominant.

1996 Act. As long as U S WEST retains its firm chokehold on local bottleneck facilities, U S WEST will continue to maintain market power in all related markets.

## **II. Pricing Flexibility Should Not Be Considered Apart From the Access Charge Reform Docket**

NEXTLINK and ELI are firmly opposed to U S WEST and other BOCs' efforts to file separate petitions on pricing flexibility issues that are essentially identical to issues the Commission is currently considering in the Access Charge Reform docket.<sup>7</sup> NEXTLINK and ELI urge the Commission to resolve these issues in the Access Charge Reform docket and to dismiss the multitude of "me too" petitions. If the Commission does not firmly direct discussion of these issues to the Access Charge Reform docket, then the BOCs, including U S WEST, will continue to file petitions for pricing flexibility, whether they are styled as petitions for forbearance or something else. Moreover, the multiple petitions for forbearance already filed by BOCs merely reinforce the fact that issues relating to pricing flexibility are national in scope, interrelated and should be considered by industry and regulators in the context of a comprehensive proceeding. In the Access Charge Reform docket, the Commission recently requested and received additional comments from parties, including U S WEST, specifically addressing the pricing flexibility issues raised in the instant petition.<sup>8</sup> The Commission should refuse to consider U S WEST's petitions for pricing flexibility outside of the Access Charge Reform docket.

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<sup>7</sup> Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

<sup>8</sup> Commission Asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility, Public Notice, FCC 98-256 (rel. Oct. 5, 1998).

### **III. U S WEST Has Failed to Provide Sufficient Evidence Demonstrating Actual Effective Competition in its Monopoly Local Telephone Service Markets**

U S WEST's petition is simply insufficient to demonstrate the overreaching claims that it makes. U S WEST has submitted a flawed study that fails to provide sufficient supporting evidence, including any underlying data, and therefore the Commission cannot rely upon U S WEST's analysis.

Similar to other petitions submitted by the BOCs for pricing flexibility, U S WEST has not considered or presented any evidence explaining why measuring market share in terms of "DS-1 equivalents" is more accurate than considering a revenue-based approach. NEXTLINK and ELI believe that U S WEST has failed to present such evidence because it would show that U S WEST's "high capacity services" market share exceeds the market share that U S WEST claims to possess in its petition.<sup>9</sup> Moreover, even U S WEST's own study shows that in the high capacity transport services market as defined by U S WEST, it has a 65% market share in the "provider" segment and a 75% market share in the "transport" segment.<sup>10</sup> Although those numbers in and of themselves demonstrate that U S WEST remains the dominant provider of "high capacity" services in the Seattle MSA, it is likely that a more accurate assessment of market share would reveal that U S WEST controls an even higher percentage of the market.

In fact, U S WEST's petition also fails to justify the existence of a single, separate "high capacity" market as U S WEST attempts to define it. Not only does the study suggest the existence of separate markets for high capacity transport for local exchange and exchange access services, but it also fails to distinguish between the provision of DS-1 and DS-3 services. U S WEST, at least, acknowledges that there may be differences between end-user and carrier customers in terms of the available supply and the services demanded. There are significant differences in providers' ability to provision services to end-user and carrier customers. The

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<sup>9</sup> U S WEST's "DS-1 equivalent" measurement method credits competitors with 24 DS-1s for every DS-3. The revenues obtained from the provision of a single DS-3, however, equal approximately the revenues obtained from 12 DS-1s.

<sup>10</sup> See U S WEST Petition at 21; U S WEST Petition, Attachment A, Quality Strategies Report at 7-8.

provision of service to any particular end-user location requires much more extensive facilities than the provision of service to a carrier's point of presence ("POP"). Only U S WEST has the extensive local facilities to provide service to all of the potential customers in an MSA. By combining all high capacity services into one "market," U S WEST does not present an accurate depiction of U S WEST's continued control over essential bottleneck local facilities.

NEXTLINK and ELI also urge the Commission to reject U S WEST's unfounded suggestion that it is a relatively simple matter for competitive local exchange carriers ("CLECs") to build additional facilities in order to reach a significantly larger portion of U S WEST's customer base. As an initial matter, NEXTLINK and ELI take issue with U S WEST's unsupported assertions regarding the costs necessary for CLECs to expand the scope of their networks. U S WEST fails to provide any underlying data to support its blanket assertions regarding the costs of competitive market entry.<sup>11</sup> In any event, U S WEST appears to have failed to even consider some key market development costs, such as rights-of-way fees and other building access fees, that are integral cost components for any competitor that chooses to enter a new market. These additional entry factors can quickly increase capital expenditures and create further delays for CLECs trying to expand the reach of their current facilities. While U S WEST's petition glosses over market entry issues, the simple fact remains that CLECs cannot simultaneously duplicate U S WEST's network overnight or anytime in the immediate future. NEXTLINK, ELI and other CLECs have taken steps to invest in and build alternative facilities in the Seattle market in order to begin to provide competitive services. It is ludicrous, however, for U S WEST to suggest that NEXTLINK, ELI or any other competitive provider has dislodged U S WEST as the dominant service provider in the market. The inherent advantages of the ubiquitous scope and scale of U S WEST's network continues to present U S WEST with tremendous advantages that still preclude new entrants from providing market discipline to U S WEST's provision of these services. The Commission has long recognized that incumbents with near monopoly power hold these distinct advantages and it has crafted regulatory safeguards to

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<sup>11</sup> U S WEST Petition at 26-29.

protect emerging competition in access markets from “foreclosure or deterrence to market entry by new entrants.”<sup>12</sup>

U S WEST's argument that CLECs can “address” more U S WEST customers through the use of U S WEST's network elements is unreasonable. This is the same U S WEST that in the three years since passage of the 1996 Act has no experience in entering any new local exchange markets outside of its historical monopoly region. Frankly, if entering local exchange markets was as easy and simple as U S WEST describes it, clearly U S WEST would have managed to enter a few new local exchange markets by now. Instead, during the past three years, U S WEST has concentrated its efforts to resisting compliance with the market-opening requirements of the 1996 Act. At every turn US WEST has gone out of its way to join nearly every effort to litigate, delay, frustrate, and otherwise ignore its legal obligations. In fact, U S WEST has made no attempt to file for Section 271 authority with the Commission for any of its in-region states. It is highly unlikely that this is because U S WEST has complied with the market-opening requirements of Section 251 and 271, but does not want to provide interLATA services. To the contrary, U S WEST has aggressively attempted to enter the interexchange market without having to meet its obligations to open up the local exchange market.<sup>13</sup>

NEXTLINK's and ELI's efforts to provide competitive service in the western United States have been delayed as a result of U S WEST's decision to severely limit CLECs' access to U S WEST's network elements. For example, U S WEST, contrary to the 1996 Act, requires CLECs to have a collocation and/or single point of termination ("SPOT") frame arrangement in

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<sup>12</sup> See In the Matter of Southwestern Bell Telephone Company, Tariff FCC No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19327 (1997) (SWBT Tariff Order”).

<sup>13</sup> See e.g., AT&T Corp., et al., Complainants v. Ameritech Corp. and Qwest Communications Corp., AT&T Corp., et al., Complainants v. U S WEST Communications, Inc., and Qwest Communications Corp., Memorandum Opinion and Order, 1998 FCC LEXIS 5192 (rel. Sep. 28, 1998); SBC Communications v. FCC, 10 CR 571 (5<sup>th</sup> Cir. Sep. 4, 1998); Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services. Memorandum Opinion and Order and Notice of Proposed Rulemaking, et al., 1998 FCC LEXIS 4127 (rel. Aug. 7, 1998).

each and every single central office where a CLEC wants to obtain an unbundled loop.<sup>14</sup>

Moreover, U S WEST offers collocation arrangements to competitors under onerous terms and conditions and at unreasonable, non-cost based rates. Even if U S WEST provided collocation arrangements at reasonable rates, terms and conditions, however, the additional unjustified requirement that CLECs collocate and/or use a SPOT frame in a central office before reaching a single customer connected to that office unduly burdens CLECs' ability to quickly attract and serve existing U S WEST customers. Furthermore, assuming arguendo that a CLEC had the capital resources to invest in obtaining collocation cages or SPOT frame arrangements simultaneously in every U S WEST central office, there is no question U S WEST could not accommodate that request.<sup>15</sup>

Through its forbearance petition, U S WEST is blatantly attempting to short-circuit the Commission's market-based approach to access charge reform. The success of the Commission's market-based approach rests upon continued vigilance over dominant incumbent providers of access services. If competition has not developed to the point where markets forces can effectively control BOC pricing and other behavior, then the inherent dangers of monopoly control are still present. The Commission must continue to demand the elimination of market entry barriers before granting substantial pricing flexibility.<sup>16</sup>

All of the pricing flexibility proposals presented to the Commission to date, including the instant petition, are an attempt by the BOCs to extinguish competition before it can firmly take root. Before the Commission adopts any framework for pricing flexibility, however, it must require real evidence of substantial competition, including the elimination of critical barriers to

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<sup>14</sup> U S WEST's requirement that a CLEC only obtain unbundled network elements through collocation arrangements and its "SPOT Frame" and U S WEST's refusal to provide CLECs with access to extended loops is further evidence of U S WEST's corporate policy to limit and discourage CLEC access to its network.

<sup>15</sup> In fact, U S WEST has been unable to even comply with its obligations under the Act to provide existing CLEC requests for collocation. Since the total number of U S WEST central offices is significantly greater than the current number of CLEC requests for collocation, it is reasonable to assume that U S WEST would fare even worse if the number of collocation requests increased to such an amount.

<sup>16</sup> See Access Charge Reform Order at para. 266.



entry in the BOCs' monopoly markets.<sup>17</sup> Without effective competition in a market, BOCs will use pricing flexibility to target and attack those markets where the potential for competition at least exists, i.e., where a CLEC is present, and pricing flexibility could be effectively used as a mechanism to destroy the prospects for future competition by undercutting any competitive offering that does emerge. The BOC can engage in such predatory pricing because it has the ability to cross-subsidize anti-competitively priced service offerings with the continued revenue streams it receives from access charges in markets where competition has yet to emerge. The Commission must be cognizant that predatory pricing might benefit some consumers in the short term, but it clearly would not be in consumers' best interests in the long run.

#### **IV. U S WEST Does Not Meet the Standards for Forbearance under Section 10**

If the Commission decides to address this petition on its merits, the Commission must deny the petition because U S WEST has failed to meet the statutory requirements for forbearance under Section 10. The evidence in U S WEST's petition alone suggests that a grant of the requested relief to U S WEST would negatively impact overall consumer welfare, thwart emerging competition and completely undermine the Commission's market-based approach to access charge reform.

First, U S WEST is currently regulated as a dominant carrier because it has unquestioned market power throughout its service territory. U S WEST has not demonstrated that it lacks market power regardless of how the "market" is defined because U S WEST has not shown that it has provided nondiscriminatory access to competitors to its bottleneck facilities, and furthermore, it has not shown that its competitors have taken sufficient market share to demonstrate that actual competition exists. A relaxation of dominant carrier regulation over U S WEST would allow U S WEST to subsidize predatory pricing in identified markets by

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<sup>17</sup> Such barriers include: (1) BOC control over bottleneck facilities and abuse of that power; (2) state and local regulations inconsistent with competition; and (3) additional barriers created by entities such as building owners and utilities.

raising prices in other markets where U S WEST is not even attempting to argue that it is not dominant.

Second, U S WEST can already lower prices in response to competitors under the Commission's existing "density zone" rules. To do so, however, U S WEST must lower those prices in both markets where there is some competition and those where there is none at all.<sup>18</sup> The Commission's existing density zone pricing rules not only enable U S WEST to lower prices in response to competitive entry, but they also promote overall consumer welfare by requiring U S WEST to simultaneously lower prices in markets where some competition exists as well as markets where competition has yet to arrive. The long term danger in U S WEST's requested relief is that it would arm the incumbent with the capability to drive out new entrants in small pockets of emerging competition while permitting U S WEST to enjoy the fruits of monopoly pricing in those markets where no competitive alternative exists. Such a result is completely contrary to the requirement of Section 10 that U S WEST show that regulation is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that service are just, reasonable and not unjustly or unreasonably discriminatory. U S WEST's only defense to this concern is its contention that it has little ability to maintain prices well above those of its competitors and that consumers will not be harmed if its petition is granted. U S WEST has completely failed to address its ability to cross-subsidize its high capacity services in the Seattle MSA with revenue obtained from areas in which it indisputably retains dominant market power.

Furthermore, a grant of U S WEST's petition would harm both the short and long-term interests of consumers. Although some customers in some markets may benefit from U S WEST's ability to charge lower prices, overall consumer welfare will be decreased because U S WEST will no longer have to make those rates available to all consumers in similar density zones. In the long-term, U S WEST's ability to predatorily price and cross-subsidize its services in the markets at issue in the petition will destroy CLECs' ability to compete and damage the

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<sup>18</sup> See 47 C.F.R. § 69.123.


long term prospects for sustainable, irreversible competition in these markets. That will only result in U S WEST's unfettered ability in all markets to charge supracompetitive rates.

Finally, the Commission has clearly articulated that pricing flexibility is an interrelated part of its efforts to reform the access charge rules. In addition to the above discussed harm to consumers and competitors that is clearly not in the public interest, a grant of this petition would immediately short-circuit the Commission's current market-based approach to access charge reform and any further efforts to reform its access charge rules in the Access Charge Reform docket.

## **V. Conclusion**

The Commission should dismiss U S WEST's petition for forbearance because it is an inappropriate attempt to circumvent the Commission's comprehensive rulemaking on reform of its interstate access charge rules. If the Commission chooses to consider U S WEST's petition on its merits, however, the Commission should deny U S WEST's petition because it is based on flawed and misleading evidence and fails to demonstrate that U S WEST lacks market power in the Seattle MSA. Furthermore, U S WEST's petition does not even address U S WEST's continuing lack of compliance with the market-opening requirements of the 1996 Act and U S WEST's resulting chokehold on local bottleneck facilities. U S WEST's petition does not meet the statutory requirements for forbearance and a grant of the requested relief would be contrary to the public interest. NEXTLINK and ELI, therefore, urge the Commission to reject U S WEST's petition.

Respectfully submitted,

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